SHER TREMONTE LLP

September 18, 2016

FILED UNDER SEAL VIA FAX (REDACTED VERSION ON ECF)

The Honorable P. Kevin Castel
United States District Judge
United States District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *United States v. Gary Hirst*, 15 Cr. 643(PKC)

Dear Judge Castel:

We write on behalf of our client, Gary Hirst, in opposition to the government's letter motion, dated September 17, 2016, to preclude certain testimony of Mr. Hirst's daughter, Tracey Hirst, and to raise the following three *in limine* issues that have come up in the course of trial.[1] First, by eliciting testimony about Rineon to show past connections between Mr. Hirst and Mr. Galanis, the government has opened the door to Mr. Galanis's statement to federal agents that he purposefully concealed his criminal associations in certain business dealings from Mr. Hirst. Accordingly, the defense should be permitted to put this evidence before the jury. Second, during trial last week, the government provided the defense with demonstrative charts entitled "Proceeds to Hirst Entities," which it intends to offer as Government Exhibit 910 in connection with the testimony of Paul Hinton. These charts are highly misleading, because they show the movement of funds to entities that have nothing to do with Mr. Hirst. Indeed, as the government is aware, one such entity – the account that is obliquely referenced on the chart as the "Swiss bank account" – is directly controlled by Weston, which was founded and controlled by the government's own cooperating witness, Albert Hallac. The Court should preclude the government from presenting and making arguments based on these

[1] The government also filed letters, dated September 16, 2016 and September 17, 2016, that addressed outstanding issues related to, respectively, the number of phone calls between Mr. Hirst and Jason Galanis and our request to charge the jury on two points of Cayman Islands law. We have resolved the phone call issue with the government and are currently in discussions to streamline the issues related to Cayman Islands law. Accordingly, we will write to the Court in response to that subject only to the extent necessary based on the outcome of our discussions with the government.

misleading charts. Lastly, the Court should preclude certain testimony from the government's witness Jamie Paturelli.[2]

I. Response to the Government's Letter Motion Regarding Tracey Hirst

The government moved on September 17, 2016 to preclude certain testimony of Mr. Hirst's daughter, Tracey Hirst. We intend to call Ms. Hirst for the limited purposes of eliciting her testimony that she was on vacation in California with Mr. Hirst, her mother and her brother in late May and early June 2010; that Jason Galanis visited Mr. Hirst during the family's vacation on the afternoon of May 23, 2010; and the circumstances of her father's disengagement from Gerova in early 2011. Mr. Hirst's activities during these periods are relevant and important because they are, respectively, the time periods during which the first Form 20-F was filed with the SEC on June 2, 2010, and Gerova's letter to the New York Stock Exchange was drafted and transmitted to the exchange on January 28, 2010. Ms. Hirst's testimony about these interactions with her father is highly probative as to the contested issue of Mr. Hirst's state of mind during these key periods.

We do not intend to elicit testimony from Ms. Hirst for the purpose of arousing sympathy. [redacted] The defense will exercise caution to elicit no more information from Ms. Hirst than is necessary to make the foregoing points.

We do not intend to elicit from Ms. Hirst any character evidence about her father.

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2 One additional issue remains outstanding, whether the defense will be permitted to elicit the fact that Mr. Hirst voluntarily approached the FBI in 2013 to provide information related to Gerova. That issue has been fully briefed and is *sub judice*.

II. *In Limine* Issues

a. *Evidence of Past Connections Between Mr. Hirst and Jason Galanis*

In our motion *in limine*, filed on August 28, 2016, we argued that the government should not be permitted to elicit testimony about Rineon, in which Mr. Hirst was a four percent shareholder. Such testimony, we argued, would be in the nature of 404(b) evidence, for which the government had not provided notice. Following jury selection, the government argued in open court that Rineon is a "necessary element of the charged conspiracy," Tr. 30:16-17, for two reasons: First, because Rineon stock was one of the securities purchased by corrupt investment advisers in the matched trading component of the charged scheme (about which Mr. Hirst is not alleged to have knowledge). Tr. 30:17-31. Second, because at the time Gerova acquired the Wimbledon assets from Weston, the transaction that generated the disputed Shahini finder's fee, Gerova also acquired an insurance company known as Amalphis from Rineon. Tr. 31:11-32:5. In response, we noted that we did not object to the government mentioning Rineon and eliciting how it fits into the overall story of Gerova, but that we would object to any effort by the government to connect Mr. Hirst to Rineon for the purpose of insinuating that Mr. Hirst knowingly participated in the subsequent wrongful conduct of Jason Galanis and others. Tr. 32:20-33:17. We also argued that Mr. Hirst's ownership of Rineon shares was not relevant to the question of whether or not Mr. Hirst formed the criminal intent to engage in the charged fraud. Tr. 34:23-35:5. The government responded as follows:

> I actually do think it's relevant because I think there will be evidence from our witness that Jason Galanis was the person who controlled Rineon. So to the extent that they intend to argue some inference that Mr. Hirst had limited connections to Jason Galanis, that it was just to the extent of the evidence that we are offering about Gerova, no, they have connections in other ways, as well, including common investments in Rineon, and we think that's relevant to the story to suggest.
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> As I think we noted, it is a legitimate 404(b) purpose – to the extent that it's not considered part of the evidence of this particular conspiracy – it's a legitimate 404(b) purpose to show connections between conspirators, and the fact that there's a common investment in this company Rineon I think is relevant to showing the connection between Mr. Hirst and Mr. Galanis.

Tr. 35:7-122. The Court reserved ruling on whether the evidence was admissible on Rule 403 grounds based on Mr. Hirst's position as a shareholder in Rineon, but ruled that "assuming it is a substantial position and it does bear on the connection and the background between two coconspirators, I will allow it." Tr. 37:2-4. The government subsequently elicited testimony from Michael Hlavsa that Mr. Hirst "owned some shares in Rineon through entities that I would categorize his involvement in." Tr. 339:24-24.

Crediting the government's explanation for the relevance of this testimony, it is likely to argue in closing that Mr. Hirst and Mr. Galanis's association on a prior business venture establishes the "connections between conspirators" and further suggest that Mr. Hirst could not have been the unwitting dupe of Mr. Galanis because of these prior dealings. *See United States v. Rosa*, 11 F.3d 315, 334 (2d Cir. 1993) (holding that "it is within the court's discretion to admit evidence of prior acts to inform the jury of the background of the conspiracy charged, in order to help explain how *the illegal relationship* between participants in the crime developed, or to explain *the mutual trust* that existed between coconspirators.") (emphases added). [redacted]

Thus, to permit the government to introduce evidence about Rineon to prove that Mr. Hirst and Mr. Galanis's alleged illegal relationship involved other business relationships and investments beyond Gerova, without also permitting the defense to introduce [redacted], would be misleading and unfairly prejudicial. Because the government is using Rineon "to show the connection between the conspirators," the defense should be entitled to show that the "connection" between the defendant and Mr. Hirst is not necessarily illegal. Since "prior act evidence is generally admissible to prove that the defendant acted with the state of mind necessary to commit the offense charged," *United States v. Zackson*, 12 F.3d 1178, 1182 (2d Cir. 1993); *accord United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009) (prior bad acts evidence appropriate where defendant argued that his conduct amount to "nothing more than innocent acts of a friend, and not a knowing participation in a conspiracy"), fairness dictates that where the government has introduced such prior act evidence, the defendant must be permitted, at a minimum, to offer evidence of an innocent explanation. Here, the government has introduced prior business dealings that involve both Mr. Hirst and Mr. Galanis, and will likely attempt to argue from such prior dealings that Mr. Hirst was Mr. Galanis's willing co-conspirator in the charged scheme, not an unwitting dupe. Mr. Hirst must therefore be able to put [redacted] before the jury to establish that Mr. Galanis duped him in prior investments as well.

Beyond that, there is no hearsay issue because [redacted] would not be offered for its truth, but rather as evidence of his state of mind with respect to prior business dealings with Gary Hirst. It is thus probative of the critical question of whether or not there was a "meeting of the minds" to form a criminal conspiracy. Indeed, [redacted] directly contradicts the inference that Mr. Hirst and Mr. Galanis were "partners in crime" with a prior "basis for the trust between" them. *United States v. Brennan*, 798 F.2d 581, 590 (2d Cir. 1986). Because the government has introduced evidence of the prior associations of Mr. Hirst and Mr. Galanis to show a knowing agreement to enter a criminal conspiracy, [redacted]

[redacted]

b. *Government's Proposed Exhibit 910*

The government proposes to introduce several summary charts that purport to show the movement of Shahini proceeds in and out of alleged "Hirst Entities" (a copy of the proposed exhibit is attached hereto as Exhibit A). The charts should be precluded as misleading and because the government lacks a good faith basis to offer them.

In both the original and Superseding Indictment, the government alleged that "[o]n or about June 22, 2010, $2,620,000 of the proceeds from the sales of Gerova shares in one of the SHAHINI Accounts was transferred by wire to a bank account associated with an entity controlled by GARY HIRST." Superseding Indictment ¶ 60(c). The government referred at several points in its opening to Mr. Hirst and the alleged co-conspirators using Gerova as their "personal piggy bank." Tr. 51:4, 53:18, 59:23-24. To the extent these allegations suggest Mr. Hirst received proceeds from sales of the Shahini shares, they are demonstrably false.

First, the evidence is clear that the $2.6 million at issue were the proceeds not of sales of stock, but of a margin loan against shares in Shahini's brokerage account. Second, no document nor any witness testimony in this case will establish that Mr. Hirst knew the $2.6 million were derived from the Shahini shares or came from an account related to Shahini.[4] Third, and most important, Mr. Hirst did not receive the $2.6 million. Although the funds were initially deposited in a bank account of Taurus Global Opportunities Fund, of which Mr. Hirst is neither a director nor an officer, documentary evidence conclusively shows that the funds were immediately transferred to a separate entity, called Pennine Investors LTD ("Pennine"). Although Mr. Hirst had founded Pennine years earlier, by the time of the $2.6 million transfer, Mr. Hirst had resigned his previous role in the company and was serving it only in his capacity as a signatory. Mr. Hirst held no control over or beneficial ownership in any of the fund's assets, including

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3 [redacted]

4 Not only are there documents making clear that Mr. Hirst believed the $2.6 million came from a perfectly legitimate and entirely different source, but these margin funds were borrowed against shares of other stock besides Gerova's; accordingly, the government does not have a good faith basis for asserting that the total $2.6 million is derived from the alleged criminal activity in this case.

the funds maintained in the company's bank accounts for which he was a signatory, other than the authority to move such funds in connection with investments or redemptions. Additional documents (which the defense located and voluntarily disclosed to the government well in advance of trial) make clear that from that account, Mr. Hirst, in his administrative role as signatory, transferred the funds to a Swiss Soc-Gen account owned by the Wimbledon Fund and controlled by Albert Hallac, a government cooperator in this case. The transfer to the Soc-Gen account was the second and final installment to repay Albert Hallac for a $5 million subscription in Pennine that Hallac made at Galanis's urging in early 2010. Weston received the $2.6 million, not Mr. Hirst, who had no reason to know that the $2.6 million had anything to do with a margin loan collateralized by the Shahini shares.

The defense presented this evidence to the government weeks ago and specifically requested that it reevaluate its allegation that Mr. Hirst received the $2.6 million. The government previously did not know the identity of the owner of the Soc-Gen account (despite the fact that Mr. Hallac is the government's cooperating witness). Nor has the government disclosed to us what investigative steps, if any, it had previously undertaken to determine who controlled the Soc-Gen account. Nevertheless, the government has indicated that it still intends to argue that Mr. Hirst profited by using Shahini proceeds to repay part of a $5 million loan from Mr. Hallac. Mr. Hallac's 3500 material does not support that theory; instead, Mr. Hallac told the government that, at the behest of Jason Galanis, he made a $5 million investment in Global Asset Fund, which he understood to be Mr. Hirst's fund.

In the face of this evidence, it is dishonest to suggest, as Government Exhibit 910 does, that (a) the ownership of the Swiss Soc-Gen account is unknown, (b) that Pennine and Global Asset Fund are distinct entities, when in fact Global Asset Fund is merely the brokerage account of Pennine, and (c) that they are "Hirst entit[ies]" None of these assertions is true and presenting them to the jury is misleading, confusing, and unfairly prejudicial. The exhibit is also misleading in several other ways:

- First, the exhibit lists eight entities that purportedly received $2.3 million in transfers from Pennine. Six of these entities have no connection whatsoever to Mr. Hirst.

- Second, listing the two that do have a connection to Mr. Hirst, Gerova Financial Group and First Florida Equity Holdings, is also misleading. With respect to Gerova, it is undisputed that Mr. Hirst never sold any of his shares, and thus had no opportunity to benefit from the Gerova expenses paid through the Pennine account. With respect to First Florida Equity Holdings, that was a holding company for Insurance Company of America, in which Mr. Hirst holds a substantial stake, and Mr. Hirst owned a 33% stake in First Florida. The wire transfer information provided by the government indicates that $100,000 was transferred from Pennine to an IOLA Escrow account of a law firm called Treff & Lowy PLLC with a reference to First Florida, but the wire transfer information also reflects a $560,000 transfer *from* Insurance Company of America *to* Pennine – a transfer conspicuously absent from the government's chart – putting Mr. Hirst in the red with respect to these transactions.

- Third, the chart does not reflect $1.2 million in transfers from other sources to Pennine. The suggestion that all assets coming out of Pennine are traceable to the $5 million Weston investment thus ignores the precept that money is fungible.

- Fourth, the chart does not reflect multiple wire transfers out of the Pennine account during the same time period to Michael Hlavsa, the government's witness, Hodgson Russ LLP, and Jared Galanis's law firm.

Permitting the introduction of Government Exhibit 910 – and any argument by the government propounding the false facts that it suggests – would allow confusion and misleading information to pervade the jury's thinking about a crucial issue in the case: whether Mr. Hirst profited in any way from the charged scheme. The Court should preclude it on Rule 403 and due process grounds. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959).

c. *Testimony of Jamie Paturelli*

Finally, the government has stated that it plans to call, as early as Monday, Jamie Paturelli, who is an employee of the New York Stock Exchange. While Mr. Paturelli may properly testify to the facts surrounding the circumstances surrounding the NYSE's inquiry into certain aspects of Gerova in January 2011 and Gerova's subsequent response to that inquiry, any testimony that extends beyond these basic facts, especially insofar as such testimony would encompass Mr. Paturelli's opinion of Gerova or the circumstances of the company's submission in response, should be precluded pursuant to Fed. R. Evid. 403. The 3500 material for Mr. Paturelli is replete with references to "concerns," "problems," and "red flags," on matters relating to an SEC investigation, the company's "control of the Stillwater funds, and the "400 round lot share holder requirement." Such opinion testimony lacks proper foundation and could risk unfair prejudice and juror confusion. Accordingly, to the extent the government seeks to elicit such evidence, it should be precluded.

Respectfully submitted,

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